

# THE YALE LAW JOURNAL POCKET PART

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## My Debt to Mirjan Damaška

Mirjan walked into my life in the Fall of 1972. I was 29, he was 41, but both of us were at the beginning of our academic careers in America. I was a lucky guy. My DNA was programmed for standardized tests. This curious aptitude propelled me out of the Bronx to Harvard College and Yale Law School. I served as a law clerk for Henry Friendly and John Harlan, followed up by writing a couple of long articles, and, voila, this proved to be a recipe for a full professorship at the University of Pennsylvania. I was, to put it mildly, confident in my bright, shiny intellectual tools and expansive about the rich possibilities of life in America—in short, I was naïve, breathtakingly naïve.

Mirjan had come to Penn via a different route. He was a leading participant in the liberalization of communist life during the “Croatian Spring” of the 1960s—and had been bitterly disappointed by the repression that followed. With reluctance, he and his wife Maria had decided to uproot themselves from their beloved Zagreb. They were rebuilding their lives from the ground up. Mirjan looked on in disbelief as I happily babbled about the mind-blowing implications of John Rawls and Guido Calabresi for the study of law. Mirjan did not come to America to herald a decisive advance in jurisprudence. He went into exile to gain the scholarly freedom to reflect upon the great crises of legality of the twentieth century. His brooding Slav soul was a standing rebuke to my heady American optimism about the future.

It was not a recipe for a marriage made in Heaven—but so much the worse for recipes. It was intellectual love at first sight, and soon enough Maria and Susan joined us to create a quadrilateral of friendship that has been a centerpiece of my life for more than thirty-five years.

American legal education—then and now—is remarkably parochial. My student days at Yale Law School were a time of great intellectual ferment. Teachers like Alexander Bickel, Charles Black, Robert Bork, Guido Calabresi, Ronald Dworkin, Charles Reich, and Harry Wellington were engaged in an exhilarating conversation exploring the ultimate aims and nature of law. But in

all their teaching, the legal world beyond America was the merest blur on the horizon: England was a (partial) exception, but a great fog appeared at the Channel, and the Continent was permanently obscured from view.

Until Mirjan entered my life. For him, comparative law wasn't the learned accumulation of curious details from far-off places, or even the restatement of familiar platitudes contrasting adversarial and inquisitorial systems. He was engaged in a stunningly ambitious project—drawing on Weber and other social theorists to develop a profound reinterpretation of the Western legal tradition. The key questions, he convinced me, arose from the competing visions of the state and the competing structures of authority that had emerged in the West over the past millennium. The Continental world was dominated by an activist state that sought to impress one or another set of ideals on a recalcitrant society through a well-organized cadre of bureaucrats—selected first from the Church and later from increasingly secular universities. The English-speaking world, in contrast, was governed by the philosophy of a reactive state, which aimed principally to resolve disputes through a coordinated structure of local notables presiding over jury trials. Damaška insisted that we can gain a deeper understanding of Western law only by locating particular legal doctrines within these competing visions of the state and authority.<sup>1</sup>

Damaška has, of course, developed these insights in classic works like *The Faces of Justice and State Authority*.<sup>2</sup> But early on, I was convinced that his thesis had a far wider range of application. His insights were crucial in helping me to place my own understanding of the fundamental philosophical challenges of the late twentieth century. The West was moving beyond the classic dichotomies of the night-watchman state, on the one hand, and authoritarianism, on the other. American political philosophy was trying to define a middle way—elaborating principles of justice that respected freedom but insisted on a just distribution of educational and economic opportunities for all citizens. John Rawls is, of course, the most famous exponent of this activist form of liberalism<sup>3</sup>—and, as one of my tutors at Harvard College, he convinced me of the importance of this enterprise. During the early years of my lifetime conversation with Damaška, I was writing *Social Justice in the Liberal State*,<sup>4</sup> which tried to develop further the philosophical foundations of the activist liberal project. As I talked with Mirjan, I became convinced that his

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1. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 16-46, 71-96 (1986).

2. *Id.*

3. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

4. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

evolving reflections enabled philosophical liberals to move beyond utopian speculation and consider the distinctive challenges involved in creating viable liberal states in the real world.

His framework pinpoints the legal tensions that predictably arise as Anglo-American systems try to negotiate the transition from a reactive state to a more activist liberalism. Damaška predicted that the Anglo-tradition of reactive governance by legal notables would be challenged by a rising cadre of technobureaucrats charged with the task of correcting market failures and providing millions of citizens with the prerequisites of social justice.<sup>5</sup>

And he was right. His brilliant books have helped us to appreciate the institutional and doctrinal tensions that result when activist bureaucracies challenge traditional judges, and when judges take on new activist tasks.<sup>6</sup> As we talked about his exciting project over countless lunches, I thought that I might contribute something to the larger enterprise that Mirjan had pioneered. His work consistently emphasized the procedural aspects of the great transition to activist and bureaucratic modes of justice. But perhaps his focus on process could be supplemented by a parallel inquiry into the substance of legal discourse: Did the transition from a reactive to an activist state encourage American lawyers to talk about substantive law in a new way?

This question has shaped my entire scholarly career, but Damaška's influence is most obvious, perhaps, in my books *Private Property and the Constitution*<sup>7</sup> and *Reconstructing American Law*.<sup>8</sup> My central concern was to show how the substantive categories of American law were slowly transformed as the American state adopted more activist notions of liberal justice. Following Damaška's lead, my argument was built around a dichotomy. I proposed two competing models of legal discourse: Ordinary Observing and Scientific Policymaking.<sup>9</sup> Ordinary Observing tracked Damaška's model of the traditional English speaking world of coordinate authority and the reactive state. In this legal universe, lawyers talk to juries in ordinary language, urging them to apply prevailing social norms to resolve the individual dispute presented at trial. Scientific Policymaking elaborated on the implications of the rise of a more activist and hierarchical style of government in twentieth-century America. In the legal universe dominated by Scientific Policymaking, lawyers no longer talk primarily to juries, supervised by gentlemen-judges. They

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5. See, e.g., MIRIJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 147-48 (1997); DAMAŠKA, *supra* note 1, at 231-34.

6. See, e.g., DAMAŠKA, *supra* note 5, at 147-48; DAMAŠKA, *supra* note 1, at 231-34.

7. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

8. BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

9. ACKERMAN, *supra* note 7, at 10-20.

instead talk to specialists in the bureaucracy and professionals in the judiciary about the best way to implement the large ideals of liberal justice that lie at the core of the state's activist project.

In the spirit of Damaška and Weber, I am dealing in ideal types here. The real world of American law represents fascinating, and often confusing, mixtures of Scientific Policymaking and Ordinary Observing. One great challenge is to clarify these discursive mixtures and to map them on to Damaška's parallel work on coordinate and hierarchical styles of governance. I tried to provide a case study in *Private Property and the Constitution*, but, to put it mildly, there is a lot more to be done.

At the same time, Damaška's work raises a larger question. Following Weber, he emphasized the specialist ethos of rule elaboration that governed bureaucratic and juridical life on the Continent.<sup>10</sup> But as we discussed the rise of the activist state, Damaška helped me see that Americans were developing a new form of Scientific Policymaking that was quite distinct from the nineteenth century legal science developed in Europe. The key sources for the new legal science were the "law and economics" movement and post-Rawlsian liberal philosophy. My book, *Reconstructing American Law*, tried to sketch this larger transformation in American legal discourse. The book explored how "law and economics" was providing a fundamentally new way to describe the factual dimension of the problems confronting the legal system. The new analytic scheme permitted lawyers to liberate themselves from "common-sense" descriptions of problems that might persuade lay-jurors and to substitute a system of description that would impress a new breed of legal specialists trained in the use of social science and quantitative methods.<sup>11</sup> Moving from facts to norms, I explored how the methods of liberal political philosophy might be used by lawyers, judges, and bureaucrats to implement principles of social justice within an empirical understanding of problems that was compatible with cutting-edge social science.<sup>12</sup> This distinctive mix of liberal political philosophy and "law and economics" was, in short, providing the rising activist state with the analytic tools it needed for the responsible pursuit of social justice and economic efficiency in a liberal political order.

*Reconstructing American Law* was published a couple of years before Damaška's *Faces of Justice*, and its preface contains a fulsome acknowledgement of Mirjan's great influence. My shameless effort to ride on Damaška's coattails did not have the desired effect. Although Mirjan's book was recognized almost immediately as a classic, mine quickly dropped into obscurity. My call for a

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10. DAMAŠKA, *supra* note 1, at 21-23, 54-56.

11. ACKERMAN, *supra* note 8, at 46-71.

12. *Id.* at 72-104.

philosophical law and economics turned out to be a quixotic gesture in an American legal culture where Richard Posner's reductionist version of law and economics became a leading paradigm.

But perhaps we are witnessing the end of this era; perhaps the next generation will indeed witness a rebirth of the liberal activist state. Perhaps the next generation will find in the work of Amartya Sen,<sup>13</sup> Ronald Dworkin,<sup>14</sup> and Guido Calabresi<sup>15</sup> an inspiring source for future developments.

Only one thing is clear. We won't be able to understand this struggle over the future of legal analysis without Damaška's insights into the very different aspirations of the activist and reactive forms of government that coexist in America.

Damaška's work will become increasingly important over the next generation. The activist liberal state is on the rise throughout the world, and this development will provoke debates over the future of Scientific Policymaking in many countries. Up until now, Continental lawyers and scholars largely have been bemused observers of the alarming American *Methodenstreit* proceeding in mysterious Anglo-land. Whatever this debate may mean for America, the Europeans have been more or less content to continue relying on the older forms of legal science they inherited from the nineteenth century. But if I am right, liberal law and economics will have a much more general appeal to all nations struggling to define a "third way" between simplistic forms of laissez-faire and equally simplistic forms of governmental command and control. Little wonder, then, that advocates of liberal law and economics<sup>16</sup> in Europe and Asia are challenging the older forms of legal rationality that Weber took for granted in his discussion of the European *Rechtsstaat*,<sup>17</sup> and which Damaška took as the baseline for his comparative work. Although Weber's lawyer-bureaucrat-judges of the nineteenth century were rule followers, the lawyer-bureaucrat-judges of the twenty-first century will be more intellectually ambitious. Using the methods of law and economics, they will be in a position to move beyond rules to a more principled form of decisionmaking, using political philosophy to gain a more refined understanding of the legal requirements of social justice and economic efficiency in a liberal state.<sup>18</sup>

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13. See, e.g., AMARTYA SEN, *INEQUALITY REEXAMINED* (1992).

14. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986).

15. See, e.g., GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

16. See, e.g., HANS-BERND SCHÄFER & CLAUS OTT, *LEHRBUCH DER ÖKONOMISCHEN ANALYSE DES ZIVILRECHTS* [COURSEBOOK ON THE ECONOMIC ANALYSIS OF CIVIL LAW] (1986).

17. See ANTHONY KRONMAN, *MAX WEBER* 50-64, 72-95 (1983).

18. ACKERMAN, *supra* note 8, at 46-104.

We are, of course, at an early stage in this larger reorientation of legal theory and practice. The new challenge to Weberian thought will be resolved over the course of the next few generations, leading to many surprising hybrids and intellectual experiments over the course of the next century. These twists and turns will undoubtedly make Damaška's efforts, and my own, seem almost childlike in their naivety. I can easily envision some legal antiquarian of the twenty-second century shaking his head in disbelief when he accidentally comes upon some moldy volumes by the two of us in the (last remaining) Library of Printed Books.

But let me assure my friends in the twenty-second century that, however childlike our scholarly investigations may appear, my lifelong conversation with Mirjan has been a joy while it lasted, and that we wish them well as they confront the surprising transformations of the rule of law that lie ahead.

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